No. 94-1686

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SGS CONTROL SERVICES, INC.,

Petitioner,

—v.—

INTERNATIONAL ORE & FERTILIZER CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioner SGS Control Services, Inc. ("SGS) respectfully submits this Reply Brief in reply to the Brief in Opposition of respondent International Ore & Fertilizer Corp. ("Interore").

POINT 1

THE COURT OF APPEALS ABUSED ITS DISCRETION BY DECIDING THE CONTRACT CLAIM THAT THE TRIAL COURT HAD REJECTED AND THAT INTERORE WAIVED ON THE APPEAL.

Point I of SGS's Petition properly raises the question of the standard under which a court of appeals may sua sponte sustain a judgment on the alternate ground of a claim rejected by trial court and waived by the proponent of the claim.

Notwithstanding the absence of a "formal waiver" (*see* Resp. Br. at 8), there is no doubt that in the court of appeals, Interore waived its contract claims. It failed to identify any contract claim as an issue, it failed to brief any contract issue, and it failed to raise any contract issue as an alternative ground of decision, whether in its brief or at oral argument.

Interore now presents the irrelevant argument (as did the court of appeals majority opinion) that an appellee need not cross-appeal to assert an alternate ground to support a district court decree. Resp. Br. at 9. The argument is irrelevant because Interore never asserted any alternate ground to support the judgment. For tactical reasons (because it evidently thought that tort damages would be greater than contract damages), it deliberately abandoned its contract claims and pursued only its tort claim in the court of appeals.

Notwithstanding the assertions in Respondent's Brief at 8, 10-11, SGS's Petition was neither disingenuous nor misleading about SGS's argument in the court of appeals. SGS's Petition clearly and accurately described the first argument of its initial brief in the Second Circuit. See Pet. at 5 ("SGS's appellant's brief to the court of appeals argued that liability could not be founded in tort because the dispute was governed by contract" [footnote referring to additional arguments omitted]). That argument was in fact adopted by the court of

appeals in rejecting the trial court's finding of liability based on tort.

That argument, whether or not tort law governed, is not what Interore waived or what SGS had no opportunity to brief. See Resp. Br. at 10-11. What Interore waived, and what SGS did not get the chance to brief, were Interore's claims, asserted unsuccessfully in the trial court and abandoned on the appeal, that SGS was liable to Interore for breach of contract.

The trial judge had dismissed the contract claims on the ground that the damages sought were not contemplated by the parties. Consequently the trial judge never decided whether there was a breach. SGS, as the party that prevailed on the contract claims, did not present the contract claims to the court of appeals for review. Interore, as the party adversely affected by dismissal of the contract claims, completely abandoned them, and therefore waived them, in the court of appeals. Since Interore had abandoned the contract claims, it would have been improper for SGS's reply brief to respond to them and SGS did not respond to them.

Moreover, even if, *arguendo*, SGS's initial brief had raised the contract claims, Interore's failure to address them in its brief or at oral argument was still a waiver.

Despite the failure of the District Court to decide whether there had been a breach, despite Interore's abandonment of the contract claims in the court of appeals, despite the lack of opportunity for SGS to address the merits of the contract claims, the court of appeals sua sponte decided that the contract had been breached and that the judgment would therefore be affirmed. That action by the court of appeals (and not its decision that tort law was applicable; see Resp. Br. at 10-11) was the abuse of discretion for which SGS seeks review.

POINT 2

WHETHER THE DISPROPORTIONALITY PRINCIPLE APPLIES IN MARITIME CASES IS A QUESTION THAT MERITS CONSIDERATION BY THE COURT.

Interore contends that the second question presented in SGS's Petition, as to the applicability of the Disproportionality Principle in maritime cases, "is not a real issue" (Resp. Br. at 12). Interore's contention is wrong.

Whether the Disproportionality Principle applies in maritime cases is of great significance for the entire shipping industry. Hundreds of billions of dollars worth of goods are shipped annually to and from the United States by maritime transport. Virtually all of this commercial activity is dependent upon the services of maritime service companies. Much of these services is contracted for on an informal basis. Both the service companies and the shippers and receivers of this enormous maritime trade are affected by whether or not the Disproportionality Principle applies to their informal commercial dealings.

Interore argues that there is no conflict in the Second Circuit because the Disproportionality Principle "was not reached" in *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1399 (1994). See Resp. Br. at 12. In fact, the *Sundance* opinion expressly relies upon the Disproportionality Principle. *See* 7 F.3d at 1084. And in the present case, the dissenting panel member argued that *Sundance* required that the contract claim be dismissed because of the disproportion between the damages sought and the price of the informal contract between the parties. App. A-44-49. On the other hand, the majority panel members (without overruling *Sundance*) held that under maritime law the Disproportionality Principle had no application here, regardless of how extreme the disproportion might be. App. A-25-27. The conflict and confusion are very real.

SGS respectfully submits that the importance of the question presented and of the affected industry, and the confusion generated by the Second Circuit opinions, amply warrant consideration by the Court of the question presented.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, petitioner respectfully prays for issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 22, 1995

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